(24)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 397

THE NEW YORK GREAT ATLANTIC & PACIFIC TEA COMPANY, ET AL.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CARUTHERS EWING,
GEORGE S. WRIGHT,
JOHN N. TOUCHSTONE,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

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No. 397

THE NEW YORK GREAT ATLANTIC & PACIFIC TEA COMPANY, ET AL.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Petitioners, who are all of the defendants in the indictment except Business Organization, Inc., and Carl Byoir, show to this honorable court:

A.

Summary Statement of the Matter Involved.

An indictment was returned by the Grand Jury of the Northern District of Texas for a violation of the Sherman Act.

Count One of the indictment purports to charge thirteen corporate and seventeen individual defendants with a combination and conspiracy in restraint of trade in food prod-

ucts. The first twelve corporations are described as the A & P Group, eight of the individual defendants as headquarters defendants and as officers, directors, agents and employes of the A & P Group, and the other eight individual defendants as officers, agents and employes of the A & P Group. The thirteenth corporation, Business Organization, Inc., and the seventeenth individual defendant, Carl Byoir, chairman of the board of that company, are described as public relations counsel for the A & P Group. (Tr. 7-37)

Count Two of the indictment repeats the allegations of Count One and purports to charge a combination and conspiracy to monopolize such trade. (Tr. 37-46)

The corporations of the A & P Group and their officers and employes are not in competition with each other. The New York Great Atlantic & Pacific Tea Company owns all of the authorized and outstanding stock of The Great Atlantic & Pacific Tea Company of America. The Great Atlantic & Pacific Tea Company of America owns all of such stock of the other A & P corporations except the stock of Great Atlantic & Pacific Tea Company of Vermont, which is owned by the Great Atlantic & Pacific Tea Company of New Jersey. Defendants George L. Hartford and John A. Hartford, as trustees of the George H. Hartford Trust, own all of the authorized and issued stock of the New York Great Atlantic & Pacific Tea Company. (Tr. 7-18)

Thus the indictment shows that the petitioners are affiliated and non-competing units, engaged in a single enterprise, and that they are in effect a single trader.

None of the corporate defendants is a Texas corporation, each has its general offices in New York City; the residences of all of the seventeen individual defendants except one are far removed from Texas. The one Texan indicted is superintendent of the Dallas unit. (Tr. 11) The headquarters defendants, who are the general officers of the corporations of the A & P Group, are charged with dominating the other

officers, agents and employes of the A & P Group. (Tr. 28)

The indictment covers forty-seven pages of the transcript. (Tr. 1-47) For the convenience of the court in considering this petition and the accompanying brief, we have attached hereto as Appendix A, a summary of the indictment.

Petitioners filed a demurrer to the indictment, raising the following points:

(1) No allegation of fact showing jurisdiction;

(2) No allegation of fact showing trade and commerce involved is interstate;

(3) No allegation of fact showing a violation of the Sherman Act;

(4) Averments of each count mere conclusions not binding upon defendants;

(5) There is such vagueness and indefiniteness in the statement of alleged acts that defendants are not so informed of the charge as to enable them to prepare their defense or to plead former jeopardy;

(6) The indictment is duplicitous. (Tr. 48-50)

A demurrer with the same points and with the additional question that there was no allegation of fact connecting Business Organization, Inc., with the alleged wrong was filed by that organization. (Tr. 73-75)

On February 13, 1943, the trial court in his oral opinion stated that the indictment contained many inflammatory, prejudicial and irrelevant allegations, that it was vague, that it did not show jurisdiction, and that all demurrers should be sustained. (Tr. 76-91)

On February 15, 1943, the court entered an order sustaining all the demurrers. (Tr. 92)

The Government appealed to the Fifth Circuit Court of Appeals, and on July 30, 1943, the majority of that court,

through Justice Hutcheson, affirmed the judgment of the trial court sustaining the demurrer of Business Organization, Inc., and reversed and remanded the judgment of the trial court sustaining the demurrers of the other defendants. (Tr. 111-119).

Petition for rehearing was timely filed and was denied September 1, 1943. (Tr. 149).

In the decision of the majority it was held in substance:

(1) That there were many allegations in the indictment which are irrelevant and unnecessary to the charging of the offense and which, if not designed to be, are in fact inflammatory and prejudicial, and that the defendants are entitled to relief against them; that the relief is not the sustaining of a demurrer, but action by the trial court in preventing such allegations or evidence in support thereof from going to the jury. (Tr. 114)

(2) That in a criminal case such as this, where the principal question involved is whether or not a contract was made or a conspiracy entered into, the allegation of an indictment or the testimony of a witness that a contract was made or a conspiracy entered into at a certain time and place is an allegation of fact and not a conclusion. (Tr. 116)

(3) That the allegation in paragraph 22 of the indictment that the conspiracy was formed and the allegation in paragraph 26 that it has been entered into in part in the Northern District of Texas are not conclusions, but allegations of fact. (Tr. 117)

(4) That the allegation in paragraph 22 that the conspiracy was carried out in part in the Dallas Division and the allegation in paragraph 26 that the combination and conspiracy was carried out in part in said district by performance of many of the acts in paragraph 23 were not mere conclusions, but allegations of fact; that the allega-

tion in paragraph 26 that defendants advertised food and food products, particularly meat, below cost and below the price charged in other locations for the purpose and with the intent of destroying competition of independent concerns, meat dealers and local chain stores, shows jurisdiction in the trial court. (Tr. 117)

(5) That the allegations in the indictment sufficiently advised the defendants of the charge against them. (Tr. 115)

(6) That the indictment was not duplicitous because of the interrelation and ramifying activities of associated and affiliated companies of the A & P Group and their dominance and control by their officers, which make the conspiracy charged not several, but one. (Tr. 115-116)

Circuit Justice Waller filed a dissenting opinion, holding in substance:

(1) That if the facts alleged in the indictment failed to show jurisdiction, the other questions were immaterial. (Tr. 119)

(2) That as the federal court is a court of limited jurisdiction, it is necessary that the indictment allege facts from which it will affirmatively appear that the district court has jurisdiction. The constitutional guaranty that the defendants shall be tried in the district where the offense is committed shall not be lightly regarded. It is often difficult and expensive to obtain witnesses to testify at a point far removed from the scene of the offense. In the present case the dominant officers and officials of defendants reside in New York, only one defendant of a minor capacity residing in Texas, and the court should inquire, "Why is the venue sought to be fixed at Dallas, so far removed from the headquarters of the corporate defendants and the dominant corporate officials?" (Tr. 123)

(3) That the allegation that the combination and conspiracy has been entered into and carried out in part in the Northern District of Texas is a legal conclusion, and, as it is not predicated upon allegations of fact, is without effect. (Tr. 125)

(4) That the allegation that the defendants have performed in the Northern District of Texas many of the acts set forth in paragraph 23 is wholly insufficient, because paragraph 23 alleges twenty-five or thirty acts, some of which have no relation whatsoever to interstate commerce, and if such allegation purports to be one of fact, it is so vague, indefinite and uncertain that the defendants would not know how to prepare their defense or plead former jeopardy, and should not be put to the burden of preparing to disprove all of them. (Tr. 125)

(5) That the allegation that the defendants have advertised food and food products, particularly meat, below cost and the price charged in other locations, for the purpose and with the intent of injuring and destroying competition of independent concerns, meat dealers and local chains, stripped of its too vaguely asserted facts and legal conclusions, merely alleges that defendants advertised food products in Dallas below cost. The indictment does not allege that the advertisement was fruitful, and the court cannot say so. The indictment does not allege that defendants advertised food for the purpose of injuriously affecting interstate trade and commerce, unless general assertions or legal conclusions are to be given precedence over factual particularizations. It alleges it was done for the purpose of injuring competition of independent concerns, meat dealers and local chains, which was intrastate business, and it does not allege that such advertising of food either suppressed competition in the interstate market or monopolized the supply or controlled the prices, or that it was intended

so to do, or that it was in furtherance of the conspiracy. (Tr. 126-127)

(6) And that under the decision of this court in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, no fact was alleged showing jurisdiction in the trial court. (Tr. 119-130)

B.

Reasons Relied Upon for Allowance of Writ.

1. On at least five different occasions the Government has by direct appeal to this honorable court sought a review of trial court decisions sustaining demurrers to allegations of indictments such as are involved here, and four times this court has refused to consider such questions because the Government had no right of direct appeal: *U. S.* v. *Colgate* (Va.), 253 F. 522, 250 U. S. 300; *U. S.* v. *Borden* (Ill.), 28 F. Supp. 177, 308 U. S. 188; *U. S.* v. *Wayne Pump Co.* (Ill.), 44 F. Supp. 949, 317 U. S. 200; *U. S.* v. *Swift* (Col.), 46 F. Supp. 848, 317 U. S. (4) i, 87 L. Ed. 647.

In the fifth case, *U. S.* v. *French Bauer* (Ohio), 48 F. Supp. 260, the Government dismissed the direct appeal to this court. (Memo. Dec. 514, 318 U. S. 795, 87 L. Ed. 464.)

U. S. v. *Swift, supra,* was transferred by this court to the Tenth Circuit, and the Government dismissed the appeal on May 19, 1943. (Memo. Dec. No. 2729, 135 F. (2), No. 5, Adv. Sheet, 745.) In this case four members of this court urged a decision on the questions involved here even under a direct appeal. This is an opportunity for the court to pass on these questions by a proper appeal.

In *U. S.* v. *Safeway Stores* (Kan.) and *U. S.* v. *Kroeger Grocery & Baking Co.* (Kan.) each of the indictments contained the very language involved here, and on August 20, 1943, Judge Hopkins of the First District of Kansas, in a written opinion not yet reported, sustained practically the same demurrers as filed in this case, and appeals have been

taken to the Tenth Circuit Court of Appeals by the Government.

Such confusion results from these decisions and the decision of the Circuit Court of Appeals in this case, that these petitioners may be tried upon this indictment in Texas, but Safeway, Kroeger, Colgate, Borden, Swift, Wayne Pump Company, French Bauer and others cannot be tried on the same indictment in Virginia, Illinois, Colorado, Ohio and Kansas. This honorable court should grant writ of certiorari because it is to the interest of the public, the Government, and the courts that these important questions be finally determined, so that uniform treatment be given citizens under indictments of this nature.

2. The holding of the Circuit Court that the allegations, such as in paragraph 22 of the indictment that the conspiracy was in part formed in Dallas and in paragraph 26 that it has been entered into in part in Dallas, are allegations of fact showing jurisdiction and not mere conclusions, is in conflict with the decisions of other circuit courts and in conflict with applicable decisions of this court, such as *Missouri Pacific Ry. Co.* v. *Norwood,* 283 U S. 257; *Southern Ry. Co.* v. *King,* 217 U. S. 528; *Pierce Oil Co.* v. *City of Hope,* 248 U. S. 497; *Witherell & Dobbins* v. *United Shoe Machinery Co.* (C. C. A. 1st) 267 F. 950; *Lipson* v. *Socony-Vacuum Corp.* (C. C. A., 1st), 76 F. (2) 213.

3. The holding of the Circuit Court that the allegations that the conspiracy was carried out in part in the Dallas District and that the conspiracy was carried out in part in said district by performance of many of the acts in paragraph 23, particularly the advertising below cost and below prices charged in other locations, for the purpose of injuring and destroying competition of independent concerns, meat dealers and local chain stores sufficiently charges performance of acts in furtherance of the conspiracy within the jurisdiction of the trial court so as to give venue to that

court, is in conflict with decisions of other circuit courts and with applicable decisions of this court. *U. S.* v. *Socony-Vacuum Corp.*, 310 U. S. 150; *Martin* v. *U. S.* (C. C. A., 8th), 169 F. 198; *U. S.* v. *Post*, 113 F. 852; *White* v. *U. S.*, 67 F. (2) 71; *Skelly* v. *U. S.* (C. C. A., 10th), 37 F. (2) 503.

4. The holding of the Circuit Court that the indictment, which did not allege any facts showing that the conspiracy charged affected prices and competition in the interstate market, was sufficient against a demurrer, is in conflict with the decisions of other circuit courts and with applicable decisions of this court, such as *Apex Hosiery Co.* v. *Leader*, *supra; Industrial Assn. of San Francisco* v. *U. S.*, 268 U. S. 64; *Ewing-Von Allman Dairy Co.* v. *C. & C. Ice Cream Co.* (C. C. A., 6th), 109 F. (2) 898, certiorari denied, 312 U. S. 689; *Martin* v. *U. S.* (C. C. A., 8th), 169 F. 198.

5. The holding of the Circuit Court that the indictment alleges facts rather than conclusions sufficient to inform defendants of the charges against them so that they may prepare their defense or plead former jeopardy, is in conflict with the decisions of other circuit courts and with applicable decisions of this Court, such as *U. S.* v. *Cruikshank*, 92 U. S. 542, 568; *U. S.* v. *Hess*, 124 U. S. 483; *Evans* v. *U. S.*, 153 U. S. 584; *U. S.* v. *Colgate*, 253 F. 522, 528; *Fontana* v. *U. S.* (C. C. A., 8th), 262 F. 283; *Skelly* v. *U. S.* (C. C. A., 10th), 37 F. (2) 503; *Asgill* v. *U. S.* (C. C. A., 4th), 60 F. (2) 780, 784.

6. The holding of the Circuit Court that the indictment charging a conspiracy between members of the A & P Group to fix prices at retail of that group's own products, and a conspiracy between members of that group and independent grocers, and a conspiracy between members of that group and manufacturers, and a conspiracy between members of that group and other national food chains, and a conspiracy between members of that group and suppliers for

other purposes, is not duplicitous, is in conflict with decisions of other circuit courts and presents a question of Federal law which has not been but should be settled by this Court. *U. S.* v. *Winslow*, 195 F. 578, 580, aff'd 227 U. S. 202; *Rice* v. *Standard Oil Co.*, 134 F. 464.

WHEREFORE, petitioners respectfully pray that writ of certiorari be issued out of and under seal of this honorable court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, full and complete transcript of the record of all proceedings in the case of No. 10603, United States of America, Appellant, v. The New York Great Atlantic & Pacific Tea Company, et al., Appellees, and that the decree or judgment of said Circuit Court of Appeals may be reversed by this honorable court, and that your petitioners may have such other and further relief as to this honorable court may seem just.

THE NEW YORK GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY OF AMERICA,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, NEW JERSEY,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, ARIZONA,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, NEVADA,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY OF VERMONT, INC.,
THE GREAT ATLANTIC & PACIFIC TEA CORPORATION, DELAWARE,
THE QUAKER MAID COMPANY, INC.,

THE AMERICAN COFFEE CORPORATION,
WHITE HOUSE MILK COMPANY, INC.,
NAKAT PACKING CORPORATION,
ATLANTIC COMMISSION COMPANY, INC.,
GEORGE HARTFORD,
JOHN A. HARTFORD,
R. W. BURGER,
ROBERT B. SMITH,
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APPENDIX A.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 397

THE NEW YORK GREAT ATLANTIC & PACIFIC TEA COMPANY, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit, rendered on July 30, 1943, has not been officially reported, but it appears at Tr. 111-119. The dissenting opinion of Circuit Justice Waller appears at Tr. 119-130.

II.

Jurisdiction.

1. The petition for writ of certiorari is applied for under Judicial Code, Section 240 as amended February 13, 1925,

c. 229, Sec. 1, 43 Stats. 938, January 31, 1928, c. 14, Sec. 1, 45 Stats. 54, and June 7, 1934, c. 426, 48 Stats. 926 (now Section 347), providing in substance that any case, civil or criminal, in the Circuit Court of Appeals shall be competent for the Supreme Court to require by certiorari, either before or after the judgment, that the cause be certified to the Supreme Court.

2. The Circuit Court's decision was rendered July 30, 1943. (Tr. 111-130) Petition for rehearing was timely filed August 19, 1943. (Tr. 131-148) The petition for rehearing was denied September 1, 1943. (Tr. 149)

3. The trial court sustained all demurrers. (Tr. 92) The Government appealed to the Circuit Court of Appeals for the Fifth Circuit, and that court on July 30, 1943, held that the trial court correctly sustained the demurrer of Business Organization, Inc., and erroneously sustained the demurrer of petitioners and reversed and remanded the case for further proceedings in accordance with its opinion. (Tr. 111-119)

4. The cases sustaining jurisdiction are as follows: *American Construction Co.* v. *Jacksonville*, etc., 148 U. S. 372; *Forsyth* v. *Hammond*, 166 U. S. 506; *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U. S. 489; *Gay* v. *Ruff*, 292 U. S. 95; *United States* v. *Gulf Refining Co.*, 268 U. S. 542; *Anderson Mfg. Co.* v. *Davis, Collector of Internal Revenue*, 301 U. S. 337.

III.

Statement of the Case.

The summary of the matter involved in the petition contains a statement of the case except that references to the provisions of the indictment do not give a full outline of the indictment. A concise statement of the substance of the

allegations of the indictment pertinent to the questions herein raised follows:

The Indictment.

COUNT ONE

The following are defined as retail food stores in local areas:

(1) "Chains" or "food chains" are groups of four or more retail stores under single management; some of these engage in shipping, canning, packing, processing, manufacturing, brokering and wholesaling. (Tr. 7-8); (2) "combination stores" primarily sell same merchandise as grocery stores, with fresh meats; (3) "grocery stores"; (4) "independents" operating one to three retail stores (Tr. 8); (8) "self-service stores" where customers select and carry away merchandise; (9) "service stores" with clerks and deliveries (Tr. 9); (10) "supermarkets", self-service stores in thickly settled centers (Tr. 10).

The other businesses involved in the indictment are defined as follows:

(5) "Manufacturers," "canners," "processors," and "packers," who operate no retail outlets, pack, can or process food products. (Tr. 9)

(11) "Wholesalers" maintain warehouses for storage and distribution to retail stores operated by others. (Tr. 10)

The Defendants.

The defendants are (1) twelve corporations indicted as the A & P Group, each a non-resident of Texas, with general offices in New York (Tr. 10-11); (2) eight individual defendants, general officers of the A & P Group, are indicted as headquarters defendants, all residents of New

York except one, a resident of New Jersey (Tr. 11-14); (3) eight individual defendants, officers and employes of the A & P Group—five are presidents of A & P Divisions, one Agent in Charge of National Meat Department, one Agent in Charge Buying Office, and one superintendent of the Dallas unit, all non-residents of Texas except the last named; (4) Business Organization, Inc., incorporated in and with its principal office in New York, and its chairman of the board, Carl Byoir, are indicted as public relations counsel of the A & P Group. (Tr. 14-15)

Nature of Trade and Commerce Involved.

The food industry consists of activities of producing, preparing for consumption, and moving food products to consumers. The food distributing agencies are in effect a conduit through which food products continually flow in interstate commerce from points of production in one or more states to consumers in other states (Tr. 15-16).

In 1939 there were 10,945 wholesalers of consumer goods, 2,592 manufacturers sales branches, over 560,000 retail stores, most of which do not engage in any other branch of the industry. (Tr. 16) There were 387,337 grocery stores and combination stores, including supermarkets. Independents own 89.92% of the grocery stores and 89.14% of the combination stores in the country. The balance of the grocery stores and combination stores are owned by chains. (Tr. 16-17).

The New York Great Atlantic & Pacific Tea Company, a New York corporation, and the Great Atlantic & Pacific Tea Company, a Maryland corporation, are holding corporations owning the stock of one or another of the defendant corporations. The Maryland corporation owns all of the stock of the other A & P corporations except the Great Atlantic & Pacific Tea Company of Vermont, which is owned

by the Great Atlantic & Pacific Tea Company of New Jersey. (Tr. 17-18).

The A & P Group are the largest purchasers, manufacturers, processors, wholesalers and retail distributors of food products in the United States. They also manufacture, process, can, pack, wholesale and engage in the brokerage business through subsidiaries. (Tr. 18)

The subsidiaries, viz.—

(a) The Tea Company of Vermont operates retail liquor stores in Vermont.

(b) Quaker Maid operates food manufacturing plants in New York and Indiana. The products of these plants are distributed through the wholesale warehouses and retail stores of the Tea Companies of New Jersey, Arizona and Nevada, and are also sold to others. (Tr. 18-19).

(c) American Coffee Corporation maintains organizations in coffee producing countries. Green coffee is purchased from the growers and on the spot market, transported to export points, transferred to the Great Atlantic & Pacific Tea Company, and imported by it to the United States. There it is stored in A & P coffee warehouses until needed and then shipped to roasting plants, blended, roasted, packaged, shipped and distributed through the wholesale warehouses and retail stores of that company of New York, New Jersey, Arizona and Nevada.

(d) White House Milk Company purchases milk near its plants in Wisconsin and there dehydrates, cans and labels it. It is then distributed through A & P wholesale warehouses and retail stores and is sold to others. (Tr. 20).

(e) Nakat Packing Corporation operates fishing grounds off of Alaska and the Pacific Northwest, where salmon is packed and canned and then distributed through A & P warehouses and retail stores. (Tr. 20-21).

(f) The Atlantic Commission Company purchases fruits and vegetables for A & P retail stores, which it sorts, grades, packs and stores at its packing plants. 75% of these are sold in retail stores, 25% to the independent jobbing trade. That company engages in the brokerage business for growers and acts as buying broker for dealers. (Tr. 21-22).

(g) The Stores Publishing Company prints a magazine called *Woman's Day*. (Tr. 22).

(h) The grocery purchasing department of the A & P Group is at company headquarters in New York, where the purchase of all supplies and food products is controlled. (Tr. 22-23).

(i) The food products manufactured by the A & P Group and acquired by it are shipped to A & P warehouses, through which they are distributed to A & P retail stores. (Tr. 23).

Food products are purchased in various states and foreign countries and shipped in interstate and foreign commerce to A & P warehouses, which distribute same to A & P retail stores for sale to consumers, and such stores are the conduit through which such products move in interstate commerce from producers to consumers. (Tr. 23).

The number, description and location of the A & P stores, amounts of sales of each are given in Paragraphs 16, 17 and 18. (Tr. 23-27).

The products for the retail stores are requisitioned from the warehouses and billed to the stores at retail prices, except fresh meat, which is invoiced wholesale. The store personnel is required to sell same at markups specified by the warehouses. Inventories of store stocks are made at frequent intervals, the results are checked against cash receipts, and the final result is called a stock result. While there are stock losses in all retail stores, there have been stock gains in A & P stores of millions of dollars annually. (Tr. 27-28).

All the business of the A & P Group and all officers, agents and employes thereof and their subsidiaries are entirely dominated by the headquarters defendants. (Tr. 28).

Defendants by virtue of the horizontal and vertical integration of their functions and business and the centralization and control thereof as aforesaid have and exercise the power to dominate and control production, prices and distribution of a substantial part of the food products in the United States. (Tr. 29).

Combination and Conspiracy to Restrain.

22. Simply charges that the defendants "have wilfully and unlawfully formed and carried out in part in the Northern District of Texas a wrongful and unlawful combination and conspiracy to unduly, unreasonably and directly restrain interstate trade and commerce in food products produced, distributed and sold throughout the United States." (Tr. 29).

23. That the said combination and conspiracy has consisted in a continuing agreement and concert of action among the defendants, the substantial terms of which have been:

a. That they select local areas wherein they use their dominant advantage to injure and destroy competition

of independent grocers, meat dealers and small local chains by selling at retail lower than elsewhere and by combining with other national food chains in such areas to maintain retail prices (Tr. 29-30).

b. Defendants systematically prevent competition in selected trade areas throughout the United States by (1) combining with independent grocers and local and national food chains therein to fix the retail prices and terms, and (2) by combining with manufacturers to maintain resale retail prices in such areas (Tr. 30).

c. They obtain for themselves buying preference over competitors by controlling conditions under which suppliers of food products shall sell to them and to their competitors.

Here follow eighteen subdivisions of c., alleging various actions of defendants, without any allegation showing that any of said acts were done in interstate commerce or had any effect upon interstate commerce. The only allegation that purports to refer to commerce other than intrastate commerce is in (10) alleging that defendants register for export from the largest coffee producing country the entire balance of the coffee quota available for export in a year, six months before the termination of the year, and this is in reference to foreign commerce (Tr. 31-32).

d. They foster false comparisons of their prices with prices of competitors and false reports to conceal their activities and perpetuate their dominance of the distribution of food products. Here follows (1) to (4) showing that the false comparisons of their prices were prices at retail (Tr. 34-35).

24. That defendants by agreement and concert of action have done the things hereinbefore alleged they conspired to do (Tr. 35).

Effects of Conspiracy.

25. The effect, as intended, has been to directly substantially and unreasonably restrain a large part of the trade and commerce in food products among most of the states, to injure and destroy food manufacturers, processors, canners, wholesalers and thousands of independent retail food dealers, to depress prices paid to growers for fruits, vegetables, to vest in defendants control of the distribution of food products in a preponderance of the large trade areas in the United States, and to make it impossible for thousands of non-integrated independents and small chains to enter into or remain in competition with the defendants (Tr. 36).

Jurisdiction.

26. That the conspiracy was entered into and carried out in part in the Northern District of Texas, where defendants Tea Company of Arizona and Atlantic Commission Company have offices and transact business. Within three years next preceding, defendants have performed within the Northern District of Texas many of the acts set forth in paragraph 23, particularly, they have advertised food products, particularly meat, below cost and below the price charged in other locations, for the purpose and with the intent of destroying competition of independent concerns, meat dealers and local chain stores (Tr. 36-37).

COUNT TWO.

Count Two contains the same allegations as Count One, except that the conspiracy referred to in Count Two is a conspiracy to monopolize a substantial part of the interstate trade and commerce in food products (Tr. 37-46).

IV.

Specifications of Errors.

1. The Circuit Court of Appeals erred in holding that the allegations in the indictment that the conspiracy was in part formed in Dallas and entered into in Dallas were allegations of fact, and not mere conclusions, showing jurisdiction in the trial court.

2. The Circuit Court of Appeals erred in holding that allegations that the conspiracy was carried out in part in Dallas by performance of many of the acts in paragraph 23, particularly the advertising of food products, particularly meat, below cost and below prices charged in other locations for the purpose and with the intent of injuring competition of independent concerns, meat dealers and local chain stores sufficiently charged performance of acts in furtherance of the conspiracy within the jurisdiction of the trial court so as to give venue to that court.

3. The Circuit Court of Appeals erred in holding that the indictment, which did not allege any fact showing that the conspiracy charged affected prices and competition in the interstate market, was sufficient against demurrer.

4. The Circuit Court of Appeals erred in holding that the indictment alleged facts, rather than conclusions, sufficient to inform the defendants of the charges against them so that they might prepare their defense or plead former jeopardy.

5. The Circuit Court of Appeals erred in holding that the indictment charging a conspiracy between members of the A & P Group to fix prices at retail of that group's own products, and a conspiracy between members of that group and independent grocers, and a conspiracy between members of that group and manufacturers, and a conspiracy

between members of that group and other national food chains, and a conspiracy between members of that group and suppliers for other purposes, was not duplicitous.

6. The Circuit Court of Appeals erred in reversing and remanding the decision of the trial court, and in holding that the trial court was in error in sustaining the demurrer of petitioners to the indictment.

Argument.

Point A.

The indictment contains no allegation of fact showing jurisdiction.

The only allegations in the indictment purporting to show jurisdiction are the allegation that the combination and conspiracy has been entered into and carried out in part in the Northern District of Texas and the allegation that defendants have performed in said district many of the acts in paragraph 23, particularly the advertising of meat below cost and below prices charged elsewhere for the purpose of destroying competition of independent concerns, meat dealers and local chain stores.

A consideration of these allegations in connection with the alleged actions of the defendants in paragraph 23 shows that Circuit Justice Waller was correct in his dissenting opinion when he said that the allegation that the conspiracy had been entered into and carried out in part in the Northern District is a legal conclusion and, as it is not predicated upon allegations of fact, is without effect, and that the allegation that the defendants have performed within the Northern District many of the acts in paragraph 23 is wholly insufficient because paragraph 23 alleges twenty-five or thirty acts, some of which, standing alone, have no relation whatsoever to interstate commerce, and if this purports

to be an allegation of fact, it is so vague, indefinite and uncertain that a defendant would not know how to prepare his defense or plead former jeopardy or acquittal under such an indictment and should not be put to the burden of preparing to disprove, on the question of venue, all of them, when it is alleged that only some of them occurred in Dallas (Tr. 125).

As said in Justice Hutcheson's majority opinion, the indictment contains many allegations which "are irrelevant and unnecessary to the charging of the offense" (Tr. 114).

Many of the acts in paragraph 23 were wholly in intrastate commerce, such as selling at retail in local areas lower than elsewhere, combining with food chains to fix retail prices in such areas for the purpose of injuring independent grocers engaged in intrastate commerce, combining with independent grocers to fix retail prices and with manufacturers to fix resale retail prices in such areas. As none of the acts in paragraph 23 are alleged to be in interstate commerce, the court must assume that all are in intrastate commerce. *Joplin Mercantile Co.* v. *U. S.*, 236 U. S. 531, at 535.

There is no allegation of fact in the indictment showing that these actions, wholly in intrastate commerce, affected prices or competition in the interstate market so as to bring them within the condemnation of the Sherman Act as construed by Chief Justice Stone in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469.

The allegation that many of the acts in paragraph 23 were performed in said district should be disregarded, because it is a conclusion and because it cannot be ascertained from the indictment which acts were done in said district, or whether they were relevant to the charge, and it does not appear that any of such acts affected competition or prices in the interstate market. When defendants are required

to answer a charge of an unlawful conspiracy on a claim that it was in part entered into and carried out in the place where the suit is filed, their accusers should be required to allege facts so that the court may determine whether the conspiracy was in fact entered into and carried out in that district.

When the paragraph purporting to allege jurisdiction particularized the act done in the Dallas District, the allegation was the advertisement of meat below cost and below prices charged for same in A. & P. retail stores in other locations, for the purpose of destroying competition of concerns engaged in intrastate commerce. A careful search of the allegations in the charging portion of the indictment and paragraph 23 shows no allegation that defendants advertised food products below cost. The advertising of prices at retail, for the purpose of injuring competition in intrastate commerce would not give jurisdiction to the court (Tr. 8, par. 4; tr. 7, par. 2 (1)).

The allegation, "by performance of many of the acts in paragraph 23" in the Dallas District, may have referred to many of the acts said by Justice Hutcheson to be irrelevant to the charging of the offense. Such acts could in no event give jurisdiction. Such allegation may have referred to some of the many acts done in intrastate commerce, or to some of the acts of the single trader, the A. & P. Group, without combination with others. The commission of such acts would not give jurisdiction in the absence of an allegation of fact that such acts affected competition, prices, etc., in the interstate market.

This Court, in *Southern Ry. Co.* v. *King*, 217 U. S. 524, held that an allegation that a state statute requiring a railroad to keep checking the speed of its trains while approaching crossings was a direct burden upon and impedes interstate traffic and impairs the use of defendant's facilities,

that it was impossible to observe the statute in carrying mails in interstate commerce, was a conclusion, and sustained the demurrer to such allegations.

Later, *Pierce Oil Co.* v. *City of Hope,* 248 U. S. 498, by Justice Holmes, held that an allegation that an ordinance is unnecessary and unreasonable, if it be regarded as a conclusion of law on a point which the court must decide, is not admitted by the demurrer, and if it be taken to allege that facts lead to that conclusion, it stands no better, that an averment in this general form is not enough when attacked by a demurrer.

Missouri Pacific Ry. Co. v. *Norwood,* 282 U. S. 247, held that conclusions of the pleader as to matters of fact are not admitted by motion to dismiss.

Witherell & Dobbins v. *United Shoe Machinery Co.* (C. C. A. 1st), 267 Fed. 950, held that each of the allegations: that a party had been and is engaged in an attempt to unlawfully monopolize and has unlawfully monopolized the manufacture and distribution in interstate commerce to the extent of 95% of the shoe machinery, that an unlawful monopoly was being maintained, that certain leases unreasonably restrained interstate trade and commerce, that the agreements were made in the course of interstate commerce, was a conclusion and not binding.

In *Lipson* v. *Socony-Vacuum Corp.,* 75 F. (2d) 213, plaintiff sought damages under the Clayton Act prohibiting discrimination in prices, etc. The court held that each of the allegations: that the effect of the discrimination in prices was to substantially lessen competition between defendant and other refiners, that the effect of the agreement not to deal in commodities of defendant's competitors would have been to substantially lessen competition between defendant and other refiners, and that the effect of another act was to substantially lessen competition between defendant and other refiners, was a mere conclusion.

As said by Associate Justice Waller in the dissenting opinion, the indictment nowhere alleges that the acts relied upon to show jurisdiction were such transactions or practices or that they were done with sufficient substantiality to have any effect in the suppression of competition or the monopolization of the interstate market, or in the control of its prices, or in the discrimination between its would-be purchasers. In the absence of any allegation of fact showing such effect, a court should not imply that such was the effect, and conclusions in the indictment should not be substituted for allegations of fact. *Apex Hosiery Co.* v. *Leader, supra.*

POINT B.

No allegation of fact showing violation of the Sherman Act.

All conspiracies that affect interstate commerce are not condemned by the Sherman Act. Among these is a conspiracy which stops the transportation of goods in interstate commerce; another stops the manufacturing of goods which are to be transported in interstate commerce, but such interference with interstate commerce, as held in the *Apex* case, is not within the condemnation of the Sherman Act unless such interference affects competition and prices in the interstate market.

Again, there might be a conspiracy in interstate commerce itself, but the conspiracy would not be in violation of the Sherman Act unless it had the effect on the interstate market described in the *Apex* case.

A combination and conspiracy to fix retail prices in intrastate commerce might affect interstate commerce, but under the *Apex* case and other decisions of this honorable court, such combination to fix retail prices would not come within the condemnation of the Sherman Act unless such

combination had the effect on interstate competition described in the *Apex* case.

We recognize that a conspiracy between competitors to fix prices in the interstate market is *per se* an unreasonable restraint of interstate commerce. The indictment does not allege any such conspiracy. The only price-fixing charges were that the Atlantic & Pacific Tea Company and its subsidiaries, through its officials directing the business of the A. & P. Group, conspired among themselves to fix the retail prices of that group's own products, that the A. & P. Group conspired with others to fix retail prices, and with others to fix resale prices at retail (Tr. 31-34), but there is no allegation that any of these were in the interstate market or that any of them affected prices in interstate commerce.

So far as the allegations in the indictment are concerned, the articles subject to such price-fixing arrangements may have been produced or manufactured, delivered to A. & P. retail stores, and sold in the same state, and yet, under the decisions of this honorable court, even if the articles had moved in interstate commerce and had come to rest in a state, the fixing of wholesale or retail prices for sales within that state, by agreement or conspiracy between competitors would not be within the condemnation of the Sherman Act unless such fixing of prices had the effect on competition and prices in the interstate market described in the *Apex* case.

There is no allegation of fact in the indictment that any conspiracy or act had such effect. The allegations as to the effect of the conspiracy are that the defendants have wilfully and unlawfully formed and carried out a wrongful and unlawful combination and conspiracy to unduly, unreasonably and directly restrain interstate commerce in food products, and that the effect of the conspiracy, as intended, has been to directly, substantially and unreasonably re-

strain a large part of the trade and commerce in food and food products among most of the states; to injure and destroy food manufacturers, processors, canners, wholesalers and thousands of independent retail food dealers; to depress prices paid to growers for fresh fruits, vegetables and other farm products; to vest in defendants control of the distribution of food products in a preponderance of the large trade areas of the United States, and to make it impossible for thousands of non-integrated independents and small chains to enter into or remain in competition with defendants (Tr. 36).

The allegation that the conspiracy unreasonably restrained a part of the trade and commerce in food products is a mere conclusion and not binding on the defendants, as is the allegation that the effect of it was to injure food manufacturers and independent retail food dealers. The injury to these named persons, defined by the indictment as those engaged in intrastate commerce, would not bring the conspiracy within the condemnation of the Sherman Act. Depressing prices paid to growers of fresh fruits, vegetables and other farm crops would not be in violation of the Sherman Act, because such prices were paid in intrastate commerce. The allegation that the effect of the conspiracy was to vest in defendants control of the distribution of food products in large trade areas in the United States is a mere conclusion and not binding on the defendants. Likewise, the allegation that the effect was to make it impossible for thousands of non-integrated independents and small chains to enter into intrastate competition with the defendants is a conclusion, and, furthermore, the prevention of such competition would not be within the Act.

Justice Hutcheson in the majority opinion held that acts done to give effect to the conspiracy may be within themselves wholly innocent, but if they were relied upon to effect the conspiracy which the Sherman Act forbids, they fall

within the condemnation of the statute. Under the decisions of this Court, innocent acts or lawful acts may come within the condemnation of the Sherman Act only when they restrain competition or affect prices in the interstate market. *Apex Hosiery Co.* v. *Leader, supra.*

As there is no allegation that the various acts alleged in the indictment were transactions in interstate commerce, they are presumed to be intrastate. *Joplin Mercantile Co.* v. *U. S., supra.*

As there is no allegation in the indictment that any of these actions had the effect on competition, prices, etc., in the interstate market described in the *Apex* case, the indictment fails to charge a violation of the Sherman Act.

Point C.

Allegations of indictment too vague and indefinite.

The attempt to charge a criminal offense in this indictment is wholly lacking in clarity and particulars necessary to inform the defendants of the charge against them so that they may prepare their defense or plead former jeopardy.

The Fifth Amendment confers upon the accused the right to be so informed that he may prepare his defense. The Sixth Amendment requires that he shall enjoy the right to be informed of the "nature and cause of the accusation." The Supreme Court's interpretation of these provisions appears in the case of *U. S.* v. *Cruikshank*, 92 U. S. 542, in which it was held that the objects of the indictment are (1) to furnish such a description of the charge as will enable the accused to make his defense and avail of his conviction or acquittal; and (2) to inform the court of facts so that it may decide whether they are sufficient to support a conviction, and that to attain these objects—

> "* * * facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and

these must be set forth in the indictment with reasonable particularity of the time, place and circumstances."

When one is indicted, the presumption is that he is innocent, that he is ignorant of the facts upon which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested in the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading. *Fontana* v. *U. S.* (C. C. A., 8th), 262 F. 283, at 286.

This protection of the accused must be afforded in anti-trust indictments.

An indictment following the general language of the Sherman Act is wholly insufficient. The counts of the indictment under consideration must be tested not by such general allegations as "the defendants have wilfully and unlawfully formed and carried out a wrongful and unlawful combination and conspiracy to unduly, unreasonably and directly restrain interstate trade and commerce," (Tr. 29) and the effect of the conspiracy was "to directly, substantially and unreasonably restrain a large part of the trade and commerce in food and food products among most of the states" (Tr. 36), but by particular facts showing what was actually done by the accused, and if the particular facts charged do not as a matter of law constitute combinations and conspiracies in restraint of interstate commerce or a monopoly of a part of that commerce, no amount of allegations that the accused engaged in a combination or made contracts in restraint of such trade or commerce or monopolized or attempted to monopolize the same will avail to sustain the indictment. *In Re Green*, 52 F. 104, 111.

We shall not undertake to analyze the indictment in detail, but a consideration of it discloses that it is devoid of factual allegations informing the defendants of the charge against them.

It charges, for example, that defendants "select local areas," but no areas are named; that they sell at retail in those areas "sufficiently lower than elsewhere," but the areas and products are not described nor time given; that defendants combine with other national food chains to fix, maintain and follow the retail prices established by defendants, but the other parties are not named or identified, the areas are not defined, and there is no information as to the food items involved; that defendants systematically prevent competition in selected areas by combining with local food chains to fix retail prices and with manufacturers to fix resale retail policies, that they coerce suppliers to sell to other wholesalers and retailers on terms dictated by them, and to give defendants preferential discounts, but the parties to such combinations and coercions are not named; that they conspired with independents to fix retail prices in selected areas, but no areas are defined, none of the independents are named or described, although it is shown that there are more than half a million of them and the period of time covered is more than twenty years.

According to the indictment the A & P operated 15,731 stores in 1940, 14,748 in 1936 (Tr. 23), and as of May 1, 1942, they operated in 3,436 cities 6,412 stores in thirty-seven different states (Tr. 24-26). It is humanly impossible for these defendants to know or even suspect to which one or more of those areas the indictment refers.

These allegations of the indictment are sufficient to illustrate the defects therein. The Government must know the other chains, manufacturers, independents, suppliers with whom defendants are said to have combined and the local and selected areas referred to. It must be prepared to prove these acts. Defendants cannot be prepared when they are presumd to be innocent and have no information as to them. As held in *Asgill* v. *U. S.* (C. C. A., 4th) 60 F.

(2) 780, 784, a conspiracy is so easily charged and the charge so difficult to meet unless defendants are fully informed of the facts relied upon to sustain the indictment. The right to be so informed is fundamental, and it is not in harmony with the philosophy and spirit of a free people living under a written constitution that courts will accept generalities for facts.

The Government in at least five cases has attempted to appeal directly to this honorable court from decisions of lower courts holding indictments with such general, vague and conclusory allegations insufficient, and in each of those cases this court has denied the right of the Government to have this court determine the question of such deficiency of the indictment by a direct appeal under a statute that gives the right of such appeal to the Supreme Court only where the trial court's opinion has construed, or passed upon the validity of, a Federal statute.

We respectfully refer the court to the excellent opinion of Judge Hopkins, of the Federal District Court of Kansas, on August 20, 1943, in the cases of *U. S.* v. *Safeway Stores* and *U. S.* v. *Kroeger Grocery & Baking Co.*, not yet reported, in which demurrers were sustained to indictments containing the exact language used in the allegations involved in this case.

We respectfully refer the court to the excellent opinions of the trial courts in the five cases in which appeals were dismissed in this court because the Government took direct appeals from the trial courts. These cases are: *U. S.* v. *Colgate* (Va.), 253 F. 522, at 528, 250 U. S. 300; *U. S.* v. *Borden* (Ill.), 28 F. Supp. 177, 308 U. S. 188; *U. S.* v. *Wayne Pump Co.* (Ill.), 44 F. Supp. 949, 317 U. S. 200; *U. S.* v. *Swift* (Col.), 46 F. Supp. 848, 317 U. S. (4)i, 87 L. Ed. 647; *U. S.* v. *French Bauer* (Ohio), 48 F. Supp. 260, Memo. Dec. 514, 318 U. S., 87 L. Ed. 464.

In each of these cases the trial court sustained demurrers to indictments containing allegations such as are involved in this indictment.

POINT D.

The indictment is duplicitous.

Justice Hutcheson in the majority opinion of the Circuit Court of Appeals, in holding that the indictment is not subject to the objection of duplicity, called attention to the case of *George W. Burk* v. *U. S.*, 134 F. (2) 879, in which it was held that where a common thread runs through all of the actions and a common purpose animates all of the conspirators, the fact that many persons come into and many acts are embraced in the conspiracy does not make the charge duplicitous by charging many instead of one conspiracy. Justice Hutcheson then said:

> "* * * Here the common thread is the dominance of what is called the headquarters defendants in the A & P Group. As Green, in that case, was the bridge, which carried the conspiracy over from the first into the second administration and, from the standpoint of the criminal conspiracies, made the two administrations one, so here, upon the allegations of the indictment, the interrelation and ramifying activities of all the associated and affiliated companies and their dominance and control by the headquarters defendants make the conspiracy charged not several but one."

In the *Burk* case there was a charge of conspiracy of law enforcement officers to encourage the making of intoxicating liquors on the payoff system. Green, the deputy sheriff under the administrations of Burns and of his successor, Burk, by his testimony showed that both sheriffs joined the general conspiracy.

Justice Hutcheson's opinion creates the impression that the conspiracy alleged by the indictment was solely a

conspiracy between members of the A & P Group and affiliated companies. This is not true. The indictment alleges that the officers of the A & P Group conspired among themselves to do various things, such as fixing prices of their own products (Tr. 30), which petitioners say is not a conspiracy at all, because it is the act of a single trader made up of non-competing units. *U. S.* v. *General Electric Co.*, 272 U. S. 476; *U. S.* v. *Winslow*, 227 U. S. 217, 218; *U. S.* v. *United Shoe Machinery Co.*, 247 U. S. 45; *Alexander Milburn Co.* v. *Union C & C Co.* (C. C. A., 4th), 15 F. (2) 678 at 680.

In addition to this alleged conspiracy, the indictment alleges another and entirely different conspiracy between the A & P Group and a part or all of the half million independent grocers (Tr. 30); another separate, different and distinct conspiracy between this group and a part or all of the thousands of manufacturers (Tr. 30); then another entirely different conspiracy between the A & P Group and wholesalers (Tr. 31). Each of these different alleged conspiracies had a different purpose, and it is because of the joinder of these separate offenses in one count in the indictment that the petitioners contend that the indictment is duplicitous.

We do not find that this honorable court has directly passed upon this question of duplicity. We submit that the following cases support our position here: *U. S.* v. *Winslow*, 195 F. 578, 580, *Rice* v. *Standard Oil Co.*, 134 F. 464, *U. S.* v. *Borden*, 28 F. Supp. 177.

We respectfully submit, for the reasons heretofore assigned, that writ of certiorari should be granted by this honorable court, so that it may review the decisions of the Circuit Court of Appeals and finally reverse it.

THE NEW YORK GREAT ATLANTIC &
PACIFIC TEA COMPANY, INC.,

THE GREAT ATLANTIC & PACIFIC TEA COMPANY OF AMERICA,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, NEW JERSEY,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, ARIZONA,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, NEVADA,
THE GREAT ATLANTIC & PACIFIC TEA COMPANY OF VERMONT, INC.,
THE GREAT ATLANTIC & PACIFIC TEA CORPORATION, DELAWARE,
THE QUAKER MAID COMPANY, INC.,
THE AMERICAN COFFEE CORPORATION,
WHITE HOUSE MILK COMPANY, INC.,
NAKAT PACKING CORPORATION,
ATLANTIC COMMISSION COMPANY, INC.,
GEORGE L. HARTFORD,
JOHN A. HARTFORD,
R. W. BURGER,
ROBERT B. SMITH,
DAVID T. BOFINGER,
A. G. ERNST,
FRANCIS M. KURTZ,
H. A. BAUM,
O. C. ADAMS,
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Touchstone,
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Of Counsel.

APPENDIX A.

Summary of the Allegations of the Indictment.

I.

The time covered is from January 1, 1920 to date of indictment. (Tr. 7).

II.

Definitions.

2 (1) "Chains" or "food chains" are groups of four or more retail food stores operated under a single management (Tr. 7). These include chains engaged in other branches of food industry, such as shipping, canning, packing, processing, manufacturing, brokering and wholesaling.

(2) "Combination stores" are food stores primarily engaged in selling the same merchandise as grocery stores in combination with fresh meats (Tr. 8).

(3) "Grocery stores" are retail food stores offering for sale at retail various products (Tr. 8).

(4) "Independents" are persons operating one to three retail fod stores under a single management (Tr. 8).

(5) "Manufacturers," "canners," "processors" and "packers" pack, can or process food products who do not own or operate any retail outlet for their products (Tr. 9).

(6) "Private brand," "controlled brand" and "House brand" are brands, labels or trade-marks owned by wholesale distributors, including corporate food chains (Tr. 9).

(7) "Standard brands" and "advertised brands" are food products of manufacturers, canners or processors under labels or trade-marks owned by them (Tr. 9).

(8) "Self-service stores" are retail stores where customers select merchandise and carry it away (Tr. 9).

(9) "Service stores" are retail stores where clerks are provided and deliveries are made to customers direct (Tr. 9).

(10) "Super markets" are self-service retail food stores in thickly settled centers and carrying large displays of merchandise (Tr. 10).

(11) "Wholesalers" maintain wholesale warehouses for storage and distribution to retail food stores operated by others (Tr. 10).

III.

The Defendants.

3. Gives the names and addresses of twelve corporations indicted as the A. & P. Group, each with a general office in New York and each a non-resident of Texas (Tr. 10-11).

4. Gives the names and addresses of the eight headquarters defendants indicted individually and as general officers and employes of the A. & P. Group. All are residents of New York except one, a resident of New Jersey, and the general place of business of each is in New York (Tr. 11-14).

5. Gives the names and addresses of eight individual defendants also indicted as officers and employes of the A. & P. Group. Five of them are presidents of A. & P. Divisions, one an Agent in Charge of the National Meat Department, one an Agent in Charge of Buying Office, and one the superintendent of the Dallas unit. All are non-residents of Texas except the last named (Tr. 14-15).

5a. Business Organization, Inc., a New York corporation with principal office in New York City, and its chairman of the board, Carl Byoir, are indicted. They are public relations counsel for the A. & P. Group (Tr. 15).

6. Where reference is made to an act by a corporate defendant, it shall be deemed to mean that the directors and officers of such corporation ordered, ratified or did such act on behalf of the corporation (Tr. 15).

IV.

Nature of Trade and Commerce Involved.

7. The food industry consists of activities of persons producing, preparing for consumption and moving food products to consumers (Tr. 15).

8. Dwellers in urban centers are dependent upon the activities of producers, manufacturers, canners, processors, packers, wholesalers and retailers of food products for sustenance. In the course of the stream of food flowing from producer to consumers large quantities are packed in containers or transmuted by manufacturing operations into new food products. These food distributing agencies are in effect a conduit through which food products continually flow in interstate commerce from points of production in one or more states to consumers in other states. The services thus performed are essential to the distribution of food (Tr. 15-16).

9. In 1939 there were 3,937 wholesale, general line grocery establishments, 12,045 wholesale establishments, 10,945 wholesalers of consumer goods, and 2,592 manufacturers sales branches in the United States. There were over 560,000 retail stores with sales of over $10,000,000. Most retailers do not engage in any other branch of the food industry and are dependent on the services of those in other branches of industry for a large part of their supplies and upon the sales efforts of manufacturers, sales organizations, food brokers and wholesalers to create a consumer demand (Tr. 16).

10. In 1939 there were 387,337 grocery stores and combination stores, including supermarkets, with sales of over $7,000,000, or about 70% of the business of all the food stores. 385,000 were owned by chains and independents. Independents owned 89.55%, with sales of 63.17%. Chains owned 10.45% with average sales of 36.82%. Independent grocery stores owned 89.92% of the grocery stores and had sales of over $8,000; while chain grocery stores, constituting 10.08%, had average sales of over $35,000. Independent

combination stores, 89.14% of all combination stores, had average sales of over $20,000, while chains owning 10.86% of the combination stores, had average sales of over $100,000. Of the $2,800,000,000 of food sold in 1939 by food chains, 75% was sold by the 15 largest corporate food chains. The five largest chains sold 61.23% of the food sold by food chains. A. & P. sold 53% of the food sold by the five largest food chains. In 1941 the five largest food chains sold nearly 25% of the food sold by grocery and combination stores. While sales of grocery and combination stores increased between January 1, 1939 and December 31, 1941 by 16%, A. & P.'s sales increased by 24.5% (Tr. 16-17).

11. The New York Great Atlantic & Pacific Tea Company is a holding corporation, owning and holding the stock of one or another of the defendant corporations (Tr. 17-18).

12. George L. Hartford and John A. Hartford are trustees of the George H. Hartford Trust and own all of the authorized and issued stock of the New York Great Atlantic & Pacific Tea Company. The beneficiaries of said trust are members of the Hartford family (Tr. 18).

13. The New York Great Atlantic & Pacific Tea Company owns all of the authorized and outstanding stock of the Great Atlantic & Pacific Tea Company of America. The Great Atlantic & Pacific Tea Company of America owns all of the stock of the other A. & P. corporations except the Great Atlantic & Pacific Tea Company of Vermont, owned by the Great Atlantic & Pacific Tea Company of New Jersey (Tr. 18).

14 and its subdivisions describe the business of the A. & P. Group and the subsidiaries thereof (Tr. 18-23).

15. The food products manufactured, processed or purchased by the subsidiary members of the A. & P. Group are purchased in various states of the Union and in foreign countries and shipped in interstate and foreign commerce into and through other states to A. & P. warehouses, which

in turn distribute same to A. & P. retail stores, and such stores are the conduit through which such products move in interstate commerce from producers to consumers (Tr. 23).

16. Gives the number and description of the various A. & P. stores and the amount of sales of each (Tr. 24-24).

17. The A. & P. companies of New Jersey, Arizona and Nevada operate 6,412 retail food stores of which 1488 are supermarkets. These stores are served by 37 wholesale warehouses located in various places in the United States (Tr. 24).

18. Gives the names of the A. & P. companies operating in each state, number of stores therein, number of cities, the location of warehouses as of May 1, 1942 (Tr. 24-27).

19. A. & P. retail food stores are supervised by the wholesale warehouses; the warehouses procure food products to be sold and distributed through the retail stores; the advertising material of the retail stores is prepared and published by the wholesale warehouses; the warehouses keep the books of the retail stores, and store managers are accountable for all merchandise delivered to the stores and retail prices thereof. Superintendents under the direction of warehouse officers make inventories of store stocks, and the results of such inventories are checked against cash receipts, and the result is called stock result. While there are inherent stock losses in all retail food stores, there have been stock gains in A. & P. stores of millions of dollars annually (Tr. 27-28).

20. Merely alleges that the other officers and employes of the A. & P. Group are controlled and dominated by the headquarters defendants (Tr. 28).

21. Defendants by virtue of the horizontal and vertical integration of their functions and business and centralization of control thereof, have and exercise the power to dominate and control the production, prices and distribution of food and food products produced, marketed, sold and consumed in the United States (Tr. 29).

V.

Combination and Conspiracy to Restrain Trade.

22. Defendants formed and carried out in part in the Northern District of Texas a combination and conspiracy to unreasonably restrain interstate commerce in food products produced, distributed and sold throughout the United States (Tr. 29).

23. The combination and conspiracy consisted of a continuing agreement and concert of action, the substantial terms of which have been (Tr. 29):

a. Defendants select local areas and use their dominant advantage to injure competition of independent grocers, meat dealers and local chains by—

(1) Selling at retail lower than elsewhere until desired percentage of retail is obtained, using income of other areas to offset reductions in profits from such price cutting; (2) combining with national food chains to maintain such prices (Tr. 30).

b. Defendants prevent competition in selected trade areas by combining—

(1) With independent grocers, local and national food chains to fix retail prices and terms of sales; (2) with manufacturers and others to fix and maintain resale prices and policies in such areas (Tr. 30).

c. Defendants obtain discriminatory buying preference by controlling terms of sales by manufacturers and suppliers to them and competitors by—

(1) Coercing suppliers to sell on terms dictated by defendants; (2) through threats of withdrawal of patronage to maintain two prices, lower to defendants, higher to competitors; (3) by requiring suppliers to give them preferential discounts on purchases; (4) and to give protection against price increases and declines; (5) by coercing suppliers to sell direct to them at lower prices and discontinue selling direct to competitors; (6) by inducing suppliers to divert portions of their

plants to defendants' orders and then threatening to withdraw patronage unless they give defendants lower prices; (7) by obtaining options to purchase entire crops and depriving competitors access thereto; (8) by securing possession of shipments at prices to be determined after arrival in markets and upon prices controlled by them; (9) by dominating cooperative associations of growers, etc., handling substantial portions of products, and inducing them to deliver such products to defendants for disposal at terms and prices fixed by defendants; (10) by registering for export from Brazil the balance of the coffee export quota for a year, six months before its termination, cornering its supply for importation into the United States during said six months, and artificially increasing the price; (11) by coercing suppliers to grant preferential discounts on pretexts unrelated to saving or service to them by—

(a) Exacting arbitrary rebates called advertising allowances, (b) collecting brokerage where no service is rendered, (c) coercing sellers to pay them so-called brokerage on their purchases, (d) requiring independent jobbers to buy and pay profits on carlots as a condition of selling less than carlots to A. & P. stores, (e) acting as selling agent for grocers and competing shippers and as buying agent for competing jobbers, (f) creating excessive accumulations of produce through withdrawals from or failure to enter markets until prices are depressed, (g) demanding discounts for floor space rentals, etc., for pretended service to suppliers in selling defendants' merchandise at retail, and special newspaper supplement space sales and circular sales advertising only defendants' merchandise (Tr. 31-34).

d. Defendants foster false comparisons of their prices with competitors' prices and false reports to conceal their activities and perpetuate their dominance by—

(1) Publishing statements intended to foster false comparisons of their prices with prices of independent

and small local chains, (2) preparing and financing publicity for false front farmer, consumer and housewife organizations, etc., and using same in support of such false comparisons, (3) requiring suppliers subsidized by them to publish statements and give their testimony prepared by defendants in support of such comparisons, (4) secretly enhancing their actual prices above advertised prices through short-changing, short-weighing and marking up prices (Tr. 34-35).

24. For the purpose of forming and effectuating such combination and conspiracy, defendants by agreement and concert of action have done the things they conspired to do (Tr. 35).

VI.

Effects of the Conspiracy.

25. The effect of said conspiracy, as intended, has been to directly, substantially and unreasonably restrain a large part of the commerce in food products among most of the states; to destroy food manufacturers, processors, canners, wholesalers, and thousands of independent food retailers and to depress prices paid to growers of fresh fruit, etc.; to vest in defendants control of the distribution of food products in a preponderance of the large trade areas and to make it impossible for hundreds of thousands of non-integrated independents and small chains to enter into or remain in competition (Tr. 36).

VII.

Jurisdiction and Venue.

The combination and conspiracy has been entered into and carried out in part within the Dallas Division of the Northern District of Texas, wherein the Great Atlantic & Pacific Tea Company of Arizona and the Atlantic Commission Company have offices and agents and transact business. Within three years next preceding the indictment defendants have performed within the Northern District of Texas many of the acts set forth in paragraph 23, particularly

since September 1, 1939, they have advertised food products, particularly meat, below cost and below prices in other locations, for the purpose and with the intent of injuring competition of independent concerns, meat dealers and local chain stores (Tr. 36-37).

27. Defendants at the place and in the manner aforesaid, have unlawfully and intentionally engaged in a continuing combination and conspiracy to unreasonably restrain the aforesaid interstate trade and commerce in violation of the Sherman Act (Tr. 37).

COUNT TWO.

Count Two repeats the allegations of Count One and claims a combination and conspiracy to monopolize a substantial part of such interstate trade and commerce in food products (Tr. 37-46).

(30)

No. 397

In the Supreme Court of the United States

OCTOBER TERM, 1943

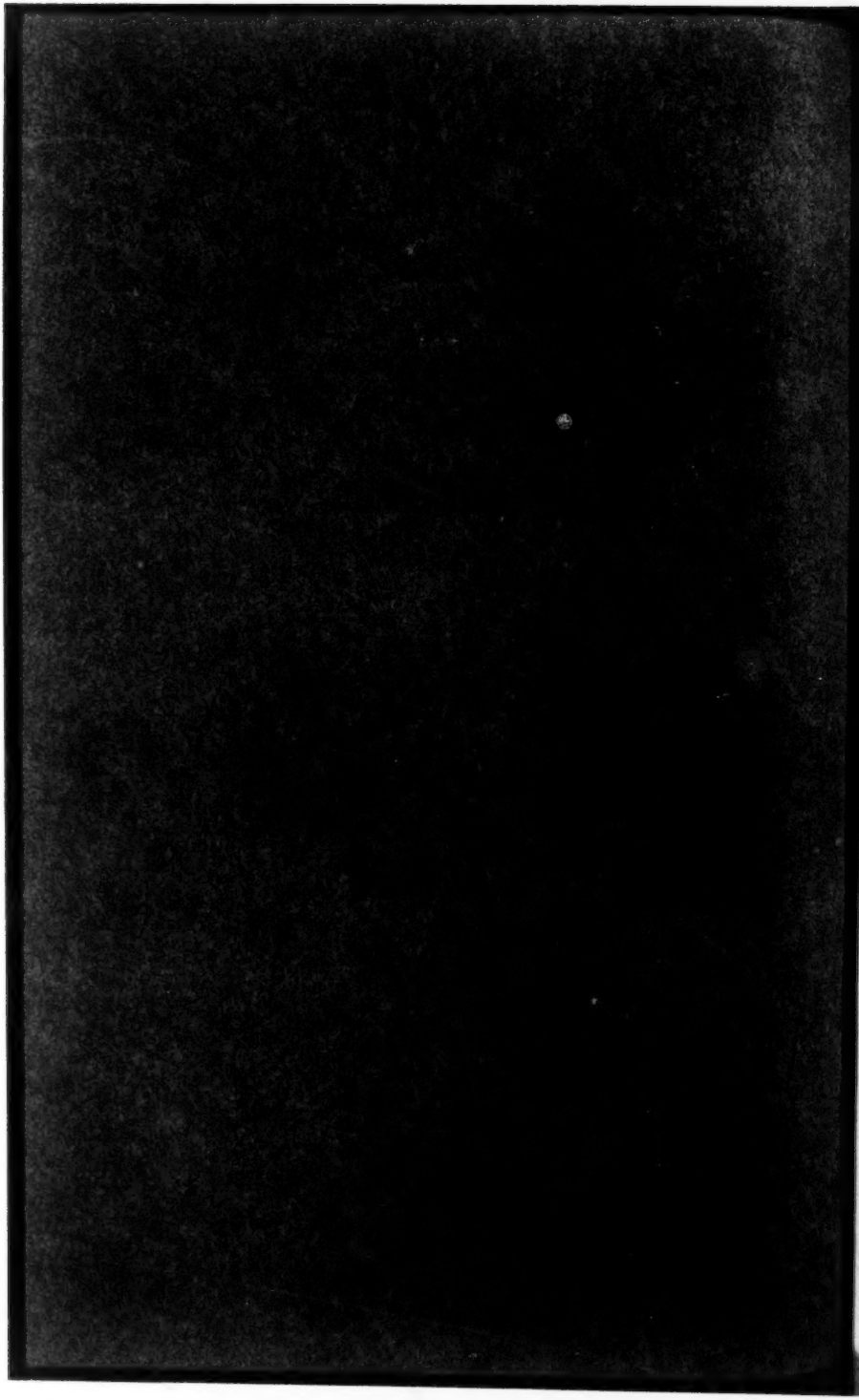
THE NEW YORK GREAT ATLANTIC & PACIFIC TEA COMPANY ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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OPINIONS BELOW

The oral opinion of the District Court on demurrer to the indictment (R. 76–91) was not reported. The opinions in the Circuit Court of Appeals (R. 111–130) are reported in 137 F. (2d) 459.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 30, 1943 (R. 130), and a petition for rehearing was denied September 1,

1943 (R. 149). The petition for a writ of certiorari was filed September 29, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal question presented is whether the allegations of the indictment sufficiently show the jurisdiction or venue of the district court. Other questions presented are whether the indictment alleges a violation of the Sherman Act, whether its allegations are too vague and indefinite to apprise the defendants of the nature of the offenses charged, and whether the indictment is duplicitous.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended by the Act of August 17, 1937, 50 Stat. 693, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor * * *. (U. S. C. sec. 1.)

> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *. (15 U. S. C. sec. 2.)

STATEMENT

This case involves the validity of an indictment containing two counts. The first (R. 7–37) charges a conspiracy to restrain interstate commerce in food and food products throughout the United States and the second (R. 37–46) charges a conspiracy to monopolize such commerce, in violation of Sections 1 and 2, respectively, of the Sherman Act. The district court sustained demurrers to the indictment (R. 92). On appeal to the court below, it upheld the indictment except as to two defendants [1] and reversed and remanded the case to the district court for further proceedings (R. 111–119).

The defendants as to whom the indictment was upheld, the petitioners here, are The New York Great Atlantic & Pacific Tea Company, Inc., eleven corporate subsidiaries of that company, and sixteen individuals alleged to be officers, agents,

[1] The court below held that the demurrer to the indictment was properly sustained as to the defendants Carl Byoir and Business Organization, Inc., alleged in the indictment to be "public relations counsel for the A & P group" (R. 118–119). The Government has not filed a petition for writ of certiorari to obtain a review of this ruling.

or employees of one or more of the corporate defendants (R. 10–15).

Count one of the indictment sets forth the following facts, among others:

Petitioners are the largest purchasers, manufacturers, and distributors (both at wholesale and retail) of food and food products in the United States (R. 18). In 1942 they operated over 6,400 retail stores located in 37 States and in the District of Columbia (R. 24–27). They not only distribute food and food products to their own retail stores but also sell to other food distributors (R. 19–21).

The food and food products which petitioners manufacture or purchase in the various States are shipped to their warehouses in other States and are distributed from these points to their retail stores (R. 23). These stores, as well as petitioners' wholesale warehouses, are divided into seven geographical divisions, and officers and employees at the headquarters of each of these divisions are responsible for all wholesale and retail operations within the division's geographical limits (R. 24). Petitioners' retail stores requisition the commodities which they need from petitioners' warehouses, and the latter invoice commodities so requisitioned at retail prices, except that fresh meat is invoiced at wholesale prices subject to the requirement that it be sold at the mark-ups specified by the warehouse (R. 27).

Warehouse officials exercise jurisdiction over all books and accounts of petitioners' retail stores, make frequent inventories of store stocks, and check cash receipts (R. 27–28).

By virtue of the horizontal and vertical integration of petitioners' functions and business, petitioners have and exercise the power to dominate and control the production, prices, and distribution of a substantial part of the food and food products marketed in the United States (R. 29).

Count one charges the petitioners with having been engaged in a conspiracy in unreasonable restraint of interstate commerce and that this conspiracy consisted in a continuing agreement and concert of action to do the following (R. 29):

(a) To use their dominant position in the trade to injure and destroy, in selected areas, the competition of independent grocers, meat dealers, and small local food chains by selling products in these areas at lower prices than elsewhere and by combining with other national food chains operating in such areas to follow petitioners' prices during such price wars (R. 30);

(b) To prevent competition in selected trade areas by combining with independent grocers and local and national food chains to fix retail prices and with food manufacturers to fix resale prices, on food sold in such areas (R. 30);

(c) To obtain for themselves discriminatory buying preferences over competitors by controlling

the terms and conditions upon which manufacturers and other suppliers of food and food products shall sell to petitioners and to their competitors [2] (R. 31);

(d) To foster false comparisons of their prices with those charged by competitors (R. 34).

The indictment alleges that the conspiracy charged in count one "has been entered into and carried out in part" within the district in which the indictment was returned and that within the preceding three years petitioners have performed within that district many of the acts set forth as constituting a part of the conspiracy, and particularly advertising food and food products below cost for the purpose of injuring and destroying the competition of independent concerns and local chain stores (R. 36–37).

Count two reaffirms and incorporates all the factual allegations of count one (R. 37). It charges a conspiracy to monopolize a substantial part of interstate commerce in food and food products and that this conspiracy has consisted in a continuing agreement and concert of action to do certain things, which are set forth in the same terms as those which are described as having been part and parcel of the conspiracy charged in count one (R. 38–44). The allegations in support of the jurisdiction and venue of the district court are in

[2] Various means used to accomplish this objective are set forth in considerable detail (R. 31–34).

the same words as the corresponding allegations of count one (R. 45).

The district court sustained petitioners' demurrer upon the ground that the indictment contained irrelevant and prejudicial statements which would render a fair trial thereunder impossible, and the court also appears to have doubted whether the allegations in support of jurisdiction and venue were sufficient (R. 76–91). The Circuit Court of Appeals sustained the validity of the indictment as against all grounds of attack urged by the petitioners (R. 111–119). Judge Waller dissented upon the single ground that the allegations respecting the jurisdiction and venue of the district court were insufficient (R. 119–130).

ARGUMENT

I

The judgment of the Circuit Court of Appeals for which review is sought is not final. It merely reverses the district court's judgment sustaining petitioners' demurrers and remands the case to that court for further proceedings. The burden of showing exceptional embarrassment or inconvenience in the conduct of the cause, to justify review at this stage (*American Const. Co.* v. *Jacksonville Ry.*, 148 U. S. 372, 384; *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 408–409), has not been met by petitioners. This is particularly true

in the light of the nature of their objections to the indictment, which raise issues of pleading. Eleven months have passed since the return of the indictment in November 1942 (R. 5). Allowance of the writ will further substantially delay bringing petitioners to trial since in that event the mandate of the Circuit Court of Appeals will not issue until after the decision and mandate of this Court. Any preliminary motions which petitioners may then file will still further delay trial of the cause. The filing of a motion for a bill of particulars is indicated by petitioners' attack upon the alleged indefiniteness of the indictment (R. 51–64; Pet. 9, 32–36) and by the expression of opinion by the Circuit Court of Appeals that a bill of particulars as to the individual defendants, if requested, should be granted (R. 119).

II

The holding of the court below that the indictment adequately shows the jurisdiction of the district court is not in conflict with the decision of any other circuit court of appeals or of this Court and is clearly correct. There are positive allegations that the conspiracy was "formed" and that it was "entered into" in part within the northern district of Texas (R. 29, 36).[3] A conspiracy under the Sherman Act is complete when it is formed and does not require either allegation or proof of an overt act in furtherance thereof, and

[3] Count two makes the same allegations (R. 38, 45).

the offense is committed and may therefore be tried in any district in which the conspiracy was formed, as well as in any district in which it has been carried out. *Nash* v. *United States,* 229 U. S. 373, 378; *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 402–403; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 252.

The indictment further explicitly alleges that the conspiracy was "carried out" in part within the district of indictment (R. 29, 36).[4] This is supplemented by the allegation that petitioners have performed in such district many of the acts [such as price wars against competitors, price fixing, obtaining discriminatory buying preferences], the commission of which is charged as being a part of petitioners' conspiracy (R. 36).[4] If petitioners, in order adequately to prepare their defense, require further particularization, this is the function of a bill of particulars. Moreover, there is specification of particular overt acts performed within the district of indictment, namely, selling foods below cost for the purpose of injuring and destroying competitors (R. 36–37, 45). Plainly, to do the very acts which it is alleged the conspiracy was formed to accomplish is to promote and further the conspiracy.[5]

[4] Count two contains the same allegations (R. 38, 45).

[5] The principal ground for the dissent below was that the allegation as to the commission of overt acts in the district of indictment must be disregarded in the absence of an allegation that these acts were performed in furtherance of the conspiracy charged in the indictment (R. 125–130).

III

The other grounds of the decision below which the petitioners specify as error likewise involve no conflict with decisions of other circuit courts of appeals or of this Court and were, we submit, properly determined.

(1) Both the district court and Circuit Court of Appeals held that the indictment charged a violation of the Sherman Act. It charges a broad conspiracy to restrain and dominate interstate commerce in food and food products by means of a wide variety of practices some of which, under the allegations, were in the direct course of interstate commerce and others of which may have operated immediately upon commerce that was intrastate.[6] The latter practices are, of course, not beyond the reach of the Sherman Act since it is settled that the statute "denounces every conspiracy in restraint of [interstate] trade including those that are to be carried on by acts constituting intrastate transactions." *Local 167* v. *United States*, 291 U. S. 293, 297.

(2) Respecting the contention that the indictment is too vague and indefinite to apprise petitioners of the offenses with which they were charged, the court below observed that, on the contrary, the indictment "has the fault not of

[6] For allegations of a conspiracy of somewhat similar scope and character, upheld against demurrer, see *Swift & Co.* v. *United States*, 196 U. S. 375.

vagueness and indefiniteness, but of a too detailed pleading of evidence" (R. 115). The indictment clearly meets the test that it set forth "the elements of the offense intended to be charged" and apprise the defendants of the accusation which they must be prepared to meet. *Hagner* v. *United States,* 285 U. S. 427, 431.

(3) The court below observed that petitioners' claim that the indictment is duplicitous is "the familiar one so often raised in connection with conspiracy indictments involving many persons and facts, that instead of charging one general conspiracy, the indictment charges many separate ones" (R. 115). Each of the two counts of the indictment alleges a single conspiracy and sets forth a variety of practices, each alleged to be a part of that conspiracy, by which the conspiracy was to be accomplished. Even assuming that some of those practices, if entered into as a separate and independent conspiracy, would be a violation of the Sherman Act, this does not make the indictment duplicitous. There may be "a single continuing agreement to commit several offenses" and the "allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects.' " *Braverman* v. *United States,* 317 U. S. 49, 52, 54. Nor is there basis for petitioners' contention that the ruling on duplicity presents a question of fed-

eral law which has not been, but should be, settled by this Court. This ruling, like all the other grounds of decision below, does not present any question of general law but simply the application of well-settled principles to a particular pleading. No question meriting review by this Court is therefore presented.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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